

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the Matter of the Petition of)
)
J & B FERTILIZER, INC.)
)
For Review of a Determination of the)
Division of Clean Water Programs,)
State Water Resources Control Board,)
Regarding Participation in the Under-)
ground Storage Tank Cleanup Fund.)
OCC File No. UST-43.)
_____)

ORDER NO. WQ 93-16-UST

BY THE BOARD:

J & B Fertilizer Inc. (petitioner) seeks review of a Final Division Decision (Decision) by the Division of Clean Water Programs (Division) regarding a claim filed by the petitioner seeking reimbursement from the Underground Storage Tank Cleanup Fund (Fund).

The ultimate issue involved in this petition is the priority class to which the petitioner's claim ought to be assigned. Petitioner sought placement of its claim in Priority Class B, commonly referred to as the Small Business Priority Classification. The Division determined that petitioner was not a small business because all officers of petitioner were not domiciled in California at the time petitioner applied to the Fund. The petitioner's claim was assigned to a lower priority class, Priority Class D. For the reasons hereafter stated, this Order determines that the Decision of the Division that the

petitioner's claim is ineligible for Priority Class B should be affirmed. This Order further finds that petitioner's claim is eligible for Priority Class C.

I. STATUTORY, REGULATORY, AND FACTUAL BACKGROUND

Chapter 6.75 of the California Health and Safety Code, commencing with Section 25299.10, authorizes the State Water Resources Control Board (State Water Board) to conduct a program to reimburse certain owners and operators of petroleum underground storage tanks for corrective action costs incurred by such owners and operators.¹ Section 25299.77 of the Health and Safety Code authorizes the State Water Board to adopt regulations to implement the program. On September 26, 1991, the State Water Board did adopt such regulations. The regulations, hereafter referred to as Cleanup Fund Regulations or Regulations, are contained in Chapter 18, Division 3, Title 23 of the California Code of Regulations and became effective on December 2, 1991. Among other things, the Cleanup Fund Regulations provide for submittal of reimbursement claims to the State Water Board by owners and operators of petroleum underground storage tanks, for acceptance or rejection of these claims by staff of the State Water Board, and for appeal of any discretionary staff decisions to the State Water Board.

Both the statutes which authorize the reimbursement program and the Cleanup Fund Regulations address the issue of prioritization of reimbursement claims.

¹ Unless otherwise indicated, all statutory references in this Order are to the California Health and Safety Code.

Section 25299.52(b) of the Health and Safety Code provides in relevant part that:

"In awarding claims pursuant to Section 25299.57 or 25299.58, the State Water Board shall pay claims in accordance with the following priorities:

(1) Owners of tanks who are eligible to file a claim pursuant to subdivision (e) of Section 25299.54.

(2) Owners and operators of tanks who meet the requirements of subdivision (a) of Section 15399.12 of the Government Code.

(3) Owners or operators of tanks, if the owner or operator owns and operates a business which employs fewer than 500 full-time and part-time employees, is independently owned and operated, is not dominant in its field of operation, the principal office is located in California, and all of the officers of the business are domiciled in California.

(4) All other tanks owners and operators."

Subdivision (a) of Section 15399.12 of the Government Code refers to a "small business" as defined by subdivision (c) of Section 14837 of the Government Code. Subdivision (c) of Section 14837 of the Government Code defines a "small business". That definition in relevant part reads as follows:

"'Small business' means a business, in which the principal office is located in California, and the officers of such business are domiciled in California, which is independently owned and operated, and which is not dominant in its field of operation."

The intent of the statutes just referenced is that second priority in reimbursement of claims from the Fund, which corresponds with Priority Class B under the Cleanup Fund Regulations, is to be given to small businesses as defined in regulations promulgated by the California Department of General Services, Office of Small and Minority Business (hereafter OSMB).

OSMB has promulgated regulations which define those entities which qualify as small businesses. (Chapter 8, Title 2, California Code of Regulations.) In relevant part, Section 1896(n)(3) of the OSMB regulations provides:

"'Small business', when used in reference to a service firm means:

"A business concern in which the principal place of business is located in California and the owners (or officers in the case of a corporation) of such business are domiciled in California, which is independently owned and operated which is not dominant in its field of operation; and which has been classified by Office of Small and Minority Business in one of the following industry groups, and does not have, together with any affiliates, annual receipts for the preceding three years, exceeding the maximum receipts specified below for the applicable industry groups...." (Emphasis supplied.)

The Cleanup Fund Regulations were modeled after the OSMB regulations. The Cleanup Fund Regulations provide in pertinent part:

"'Small business' means a business which complies with all of the following conditions....

(a) The principal office is located in California;

(b) The officers of the business are domiciled in California;

(c) The business is independently owned and operated;

(d) The business is not dominant in its field of operation; and

(e) Gross revenues from the business do not exceed the limits established by Section 1896 of Title 2 of the California Code of Regulations." (Cleanup Fund Regulations Section 2804.)

The site involved is located in Union City, California (Alameda County). Petitioner, J & B Fertilizer, Inc., purchased

the site in March of 1984 and in September of 1984, petitioner removed the three underground storage tanks located thereon. Extensive contamination was discovered during tank removal activities. The file indicates that petitioner has expended \$270,000 in corrective action costs, and anticipates spending an additional \$250,000 to \$300,000 in clean-up costs.

The petitioner is a closely held California corporation and its two major shareholders and officers are Joseph Gibson and Larry Carter.² Mr. Gibson resides and is domiciled in California. Mr. Carter and his family resided in California up until October of 1988, when he purchased a home in Oregon. Thereafter, his immediate family resided continually in Oregon. Mr. Carter spends about three-fourths of his time in California for business purposes and spends the remainder of his time at his Oregon home. While in California, Mr. Carter stays either in a mobile home parked at the subject property, or in a trailer that is transported from job site to job site.

As indicated above, the petitioner requested placement of its claim in Priority Class B. The Division determined that, in order to be eligible for Priority Class B, all officers of the corporation involved must be domiciled in California at the time the claim is filed. Since the Division determined that one of the officers, Larry Carter, was not domiciled in California at

² Elizabeth Carter owns a minor percentage of the outstanding stock, and since she is not an officer of the corporation, it is not necessary to discuss her domicile.

the time petitioner made application to the Fund, petitioner's claim was determined to be ineligible for Priority Class B, and the claim was placed in Priority Class D.³

II. CONTENTIONS AND FINDINGS

Contentions: The petitioner contends that the Division's Decision was improper and bases this contention on the following arguments. First, petitioner contends that because Larry Carter spends the majority of his time in California, that he is a domiciliary of California. Petitioner further asserts that even if it is found that Larry Carter was not domiciled in California when petitioner applied to the Fund, that it was not the intent of the Legislature to exclude businesses such as petitioner from the Small Business Priority Classification.

Findings: The critical issues involved in this matter are as follows. Were all of petitioner's officers domiciled in California at the time petitioner submitted an application to the Fund? Regardless of whether all officers were domiciliaries of California, did the Legislature intend for the Small Business Priority Classification to include businesses such as petitioner? Even if it is determined that all of the officers of petitioner were not domiciled in California when the petitioner applied to the Fund, is petitioner's claim ineligible for Priority Class C even though, at the time the tanks were removed, all of

³ Petitioner's claim was determined by staff to be ineligible for Priority Class C as that class is also limited to those businesses whose officers are domiciled in California.

petitioner's officers were California domiciliaries? In the estimation of the State Water Board, all of the questions should be answered in the negative.

As noted in the background decision above, the definition of "small business" as provided in the Cleanup Fund Regulations is modeled after the OSMB definition. The OSMB regulations were promulgated to define those entities which qualify as a small business under Section 14837(c) of the Government Code. Early in the development of the Cleanup Fund Program, the Division decided it would apply both OSMB regulations and OSMB interpretations and applications of those regulations as closely as possible in determining what constituted a "small business" for purposes of assignment to the Small Business Priority Classification. In keeping with the spirit and intent of OSMB regulations, when identifying a "small business" under the Cleanup Fund Regulations, it is appropriate to look to the Government Code for the definition of "domicile". Although the Government Code does not define "domicile" per se, Section 244 of that Code establishes rules to be applied when determining a person's legal residence. Under the Government Code, the terms "domicile" and "residence" have become synonymous. In re Marriage of Thornton, (1982) 135 Cal.App.3d 500, 508, 185 Cal.Rptr. 388. Therefore, for purposes of the Small Business Priority Classification, Section 244 of the Government Code should be applied to determine a person's domicile. Section 244 provides the following:

"In determining the place of residence, the following rules shall be observed:

(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.

(b) There can only be one residence.

(c) A residence cannot be lost until another is gained.

(d) The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of such unmarried minor child.

(e) The residence of an unmarried minor who has a parent living cannot be changed by his or her own act.

(f) The residence can be changed only by union of act and intent.

(g) A married person shall have the right to retain his or her legal residence in the State of California notwithstanding the legal residence or domicile of his or her spouse."

As indicated by the section cited immediately above, physical presence, alone, is not conclusive to the determination of legal residence or domicile. Furthermore, although a person may physically reside at several locations during any given period, a person can have only one legal residence or domicile at a time. Legal residence or domicile, as described in Section 244, implies both an act of residence and the intention to remain at that residence. During the relevant time period, Mr. Carter spent a substantial amount of his time in California. This time spent in California can be, however, characterized as temporary because Mr. Carter referred to his abode in Oregon as home and returned to his Oregon home in between business trips to California. Additionally, Mr. Carter's immediate family resided in Oregon uninterruptedly and his minor children attended school

there. Although this is not conclusive to the issue of Mr. Carter's domicile, it does indicate a sense of permanence for the entire Carter family and explains why Mr. Carter habitually returned to Oregon in between work assignments in California. In the estimation of the State Water Board, the circumstances of this case clearly establish that California was not the legal residence or domicile of Mr. Carter at the time petitioner applied to the Fund.

Even if the State Water Board finds that Mr. Carter was not domiciled in California at the time petitioner made application to the Fund, petitioner asserts that it was not the intent of the Legislature to exclude businesses such as petitioner from the Small Business Priority Classification. Petitioner concedes that certain businesses whose taxes and profits flow to states other than California should not be afforded the Small Business Priority Classification. It is, however, petitioner's contention that the characteristics of petitioner are identical to any other small business in California and the fact that one of its officers is domiciled outside of California is of no consequence. In support of this argument, petitioner provides the following: that petitioner has been a California partnership and corporation for more than thirty years; that it is a small, family-owned and family-managed business; and that petitioner pays all fuel taxes, income taxes, and property taxes to California.

As discussed above, Section 25299.52(b) of the Health and Safety Code establishes priority classes which determine the

order in which claims will be reimbursed from the Fund. This section limits Priority Class B to those claimants who could qualify for small business certification under Section 14837(c) of the Government Code and OSMB regulations. The Board has, on this day, adopted the Vollman/Clark Order (In the Matter of the Petition of Vollman/Clark Ranch Partnership, Order No. WQ 93- -UST). As indicated in the Vollman/Clark Order, in adopting the approach for establishing priority classes, the Legislature must have been aware of the then-existing Section 14837(c) of the Government Code, as well as the OSMB regulations. Furthermore, the Vollman/Clark Order held that since the Legislature apparently intended to limit Priority Class B to those businesses whose owners, or officers as in this case, were California domiciliaries at the time the claim application was filed, that the State Water Board should adhere to and enforce the limitations which were legislatively imposed.

As we also indicated in the Vollman/Clark Order, the State Water Board has greater flexibility in interpreting the statutory requirements for eligibility for Priority Class C than it does in interpreting the definition of "small business" which determines eligibility for Priority Class B. OSMB regulations and interpretations of the definition of "small business" are persuasive authority in determining eligibility for Priority Class C, but are not binding.

In defining eligibility for Priority Class C, Section 25299.52 (b)(3) expressly requires that all officers be domiciled in California, but does not specify whether this requirement

applies at the time the claim is filed or at some other time. In establishing the criteria for Priority Class C, the Legislature intended to limit eligibility to businesses located in and controlled by California residents. The legislative intent is just as well served in cases where all officers are California domiciliaries at the time of tank removal as it is in cases where all officers are California domiciliaries at the time a claim is filed. So long as the corporation's principal office is still in California at the time the claim has been filed, a corporation whose officers were California domiciliaries at the time the tank was removed should not be ineligible for Priority Class C simply because one or more of its officers is not a California domiciliary at the time the claim is filed.

III. SUMMARY AND CONCLUSIONS

1. With respect to reimbursement from the Fund, under the priority system enacted by the Legislature, Priority Class B is limited to incorporated businesses where all officers are domiciled in California.

2. For purposes of Small Business Priority Classification, the rules for determining legal residence, as provided in Section 244 of the Government Code, should be used to determine the domicile of a claimant's officer.

3. For purposes of eligibility for Priority Class B, all of the officers of a business must be domiciled in California at the time the application is filed.

4. For purposes of eligibility for Priority Class C, a business may have one or more officers who are not domiciled in California at the time the claim is filed, so long as all of the business officers were California domiciliaries at the time the tank was removed.

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5. Since all officers of petitioner were domiciled in California at the time the subject tanks were removed and when the unauthorized release was discovered, the domicile requirement for Priority Class C is satisfied.

IV. ORDER

IT IS THEREFORE ORDERED that this matter be remanded to the Division for placement of petitioner's claim in Priority Class C.

CERTIFICATION

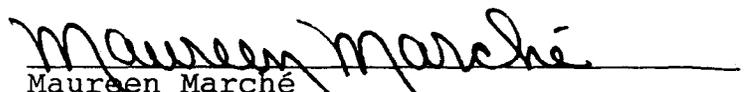
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 18, 1993.

AYE: John Caffrey
Mary Jane Forster
John W. Brown

NO: None

ABSENT: Marc Del Piero
James M. Stubchaer

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

